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23 June 2003

**Re: Comments on Draft Industrial General Permit  
No. CAS000001 and Proposed Order No. 02-01-DWQ**

Dear Board Members and Ms. Jennings:

The following are the comments of the California Coastkeeper Alliance ( an alliance of the Southern California Waterkeepers, including Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper, and San Diego Baykeeper) and of Waterkeepers Northern California (San Francisco Baykeeper and Deltakeeper), hereinafter referred to collectively as "Waterkeepers", regarding the State Water Resources Control Board's ("State Board") draft Industrial Activities Storm Water General Permit No. CA000001 and proposed Water Quality Order No. 02-01-DWQ (hereinafter "draft General Permit"). Waterkeepers thank the Board for the opportunity to comment on the draft General Permit.

The Waterkeepers object to the reissuance of the statewide Permit as drafted because it fails on a fundamental level to ensure that industrial storm water and non-storm water discharges will comply strictly with Water Quality Standards ("WQS") as required by the Federal Water Pollution Control Act ("Clean Water Act" or "CWA") and the

Porter-Cologne Water Quality Control Act ("Porter-Cologne"). Waterkeepers comments on the draft General Permit are set out in the letter below, and in the attachment to this letter setting out specific comments on the draft section by section. Waterkeeper's comments are also based on the analysis conducted by Richard Rollins, Waterkeeper's stormwater consultant, on the exhibits submitted with this letter, and on the sampling data submitted to the Regional Water Quality Control Boards, incorporated by reference into this comment letter.

## **I. OVERVIEW**

The Permit as currently drafted is a continuation of a failed regime that primarily relies on Best Management Practices ("BMPs") to achieve compliance with WQSs and the CWA. In 1994, two years after the General Permit was first adopted, the State Board and the United States EPA listed 309 water bodies as impaired, or as not supporting their designated beneficial uses. In 2003, the State Board and EPA list 687 of California's waters as impaired. Clearly overall water quality in California during the term of the General Permit has not improved. During the same period, the significant categories of industries discharging under the General Permit have consistently discharged pollutants at levels causing or contributing to impairment. The BMP based regime of the General Permit has therefore failed and will continue to fail to protect water quality.

The Board has elected to issue a general, statewide industrial storm water discharge permit, rather than individual, or category specific, industrial permits, because of the economy and ease of developing and applying the same general permitting terms to all industrial facilities in the State. While the CWA does allow the Board the discretion to adopt a general, statewide industrial permit, it does not allow the Board a similar election as to whether such a permit must require discharges to comply strictly with WQSs. The CWA requires that all industrial discharges comply strictly with WQSs and, therefore, the terms of any permit covering such discharges must ensure such compliance. The BMP based draft General Permit fails to meet these requirements. The Board must shift its focus from ease of permit administration to protection of water quality, and include such terms as are necessary to ensure that all industrial discharges comply strictly with WQSs. Because the Permit fails to protect water quality or to prevent the impairment of beneficial uses, it fails to meet the basic requirement for all NPDES permits and is therefore unlawful under the CWA.

The Permit, as currently drafted, fails to meet the CWA's basic legal requirement that industrial storm water permits not only include technology based effluent limitations, but also any stricter effluent limitations necessary to achieve compliance with WQSs. 40 § CFR 122.44(d)(1). The draft Permit relies on narrative technology based effluent limitations to achieve compliance with WQSs. As discussed in detail below, these technology/BMP based effluent limitations are a proven failure; they cannot ensure that all permitted

industrial discharges achieve strict compliance with WQSs, and, in fact, this approach ensures continued violations of WQSs by industrial dischargers. Further, numeric effluent limits represent the only viable option to achieve compliance with the CWA--numeric effluent limitations in stormwater permits are not infeasible, and are a proven success, and when they are applied to dischargers by way of individual permits, strict compliance with the Water Quality Based Effluent Limits (WQBELs) in those permits is achieved.

The Board must conduct a Reasonable Potential Analysis ("RPA") for all industrial categories and pollutants covered by the Permit given the overwhelming evidence that many industries covered by the Permit discharge pollutants at levels that cause or contribute to WQS violations. 40 CFR § 122.44(d)(1)(i). Rather than conducting the RPA required by Federal Law, however, Board Staff has in fact ignored the substantial quantity of data generated by over ten years of sample collection under the General Permit. For discharges of industrial stormwater to impaired waters, the RPA analysis is simple: discharges of impairing pollutants above WQS cause or contribute to impairment. While the RPA for other receiving waters may be more complicated, Board staff cannot simply ignore the requirements of Federal Law in adopting this Permit. Instead, Board staff must undertake the required RPA, and adopt WQBELs based on that RPA analysis.

Given the proven reliability of numeric effluent limitations in ensuring compliance with WQS, and the demonstrated failure of the narrative BMP based scheme of the General Permit in achieving compliance, Waterkeepers see no viable alternative to adopting numeric effluent limitations for all conventional, nonconventional and toxic pollutants with the reasonable potential to cause or contribute to WQS violations. While technology based and other narrative water quality criteria may be sufficient in some States to achieve strict compliance with WQSs, it is impossible in California given the 687 water bodies currently listed as impaired.

Further, the draft General Permit's monitoring program is inadequate to determine whether industrial storm water and non-storm water discharges comply with effluent and receiving water limitations and prohibitions, or to determine whether technology based effluent limitations (BMPs) are working effectively to prevent water quality violations. The Permit fails to require an adequate number of sampling and analysis events (and no requirement to sample non-storm water discharges). More fundamentally, the draft General Permit provides no methodology for determining whether a facility is violating the applicable WQS. The dischargers and the Regional Boards are left to guess as to the relationship between their end of pipe sampling and the applicable WQS, or even what WQS applies.

In the event a discharger is actually able to identify a discharge that causes or contributes to exceedance of a WQS, the discharger is then left to "self police" and report such discharge violations to the Regional Board. Further, when a discharger does determine

it is exceeding WQSs it is merely required by the Permit to implement additional BMPs **once**, regardless of the type and concentrations of pollutants being discharged. In other words, the Permit deems a discharger exceeding WQS to be in compliance with WQS if additional BMPs have been implemented, once, regardless of actual compliance with WQSs. This exercise in doublethink obviously is inadequate to ensure real compliance with the CWA. Further, deeming a discharger to be in compliance based upon a one-time implementation of additional BMPs is tantamount to providing a compliance schedule of indefinite duration. 33 U.S.C. section 1342(p)(4)(A) provides that permits must require compliance as expeditiously as practicable, but in no event later than 3 years after the issuance of the permit. By allowing dischargers to simply implement more BMPs in response to WQS violations, the Permit violates the CWA.

The terms of the Group Monitoring provisions of the proposed Permit are also wholly inadequate to demonstrate that participating industrial facilities are not discharging pollutants in exceedance of WQSs. There are too few sampling events required of participating facilities and the qualification requirements for Group Leaders are essentially meaningless since they allow virtually anyone to qualify.

As the implementing authority of the CWA for the State of California, the Board may not abdicate its legal responsibilities or delegate them to industrial dischargers. Telling industrial dischargers not to exceed WQSs does not discharge the Board's duty to provide an NPDES permit with ***terms and conditions*** which are adequate, if followed, to ensure that all industrial storm water and non-storm water discharges comply strictly with WQSs. The Board must amend the Permit to comply with its obligations as the State's NPDES permitting authority under the Act.

In summary, the Board must make the following fundamental changes to the Permit in order to comply with the CWA: (1) numeric water quality based effluent limitations must be articulated which are stringent enough to ensure that **all** industrial discharges covered by the permit comply strictly with WQSs (and only numeric effluent limitations can ensure such compliance); (2) sampling requirements and a clear methodology for determining whether BMPs are preventing a discharge violation and (3) delete the iterative approach to compliance with WQSs. In addition, Waterkeepers have attached hereto as Exhibit A a comprehensive list of comments and proposed changes to the current draft Permit.

## **II. THE PERMIT AS DRAFTED GUARANTEES NON-COMPLIANCE WITH WATER QUALITY STANDARDS**

As discussed in detail below, the Permit as drafted does not ensure industrial discharges covered by the Permit will comply strictly with WQSs and, in fact, guarantees

that such WQS discharge violations will continue to occur. The narrative effluent limitations contained in the Permit since its inception are a proven failure. The BMP approach has not and cannot ensure that all of the industrial discharges covered by the permit comply strictly with WQSs.

**A. Industrial Storm Water Discharges Must Comply Strictly With Water Quality Standards**

An NPDES permit must require compliance with effluent limitations established under 33 U.S.C. Section 1311. 33 U.S.C. Sections 1342 (a)(1), (3). Effluent limitations are defined in the Act as restrictions on “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . .”. 33 U.S.C. Section 1362(11). The CWA requires all NPDES permits to include effluent limitations necessary to meet WQSs.

In order to carry out the objective of this Act there shall be achieved not later than July 1, 1977, any more stringent [effluent] limitation, including those necessary to meet water quality standards, . . . , established pursuant to any State law or regulations . . . , or required to implement any applicable water quality standard established pursuant to this Act. 33 U.S.C. Section 1311(b)(1)(c)).

Congress further provided in the 1987 Water Quality Act (amendments to the CWA) regarding industrial storm water discharge permits:

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section *and section 1311* of this title (emphasis added). 33 U.S.C. section 1342(p)(3)(A).

In the recent decision of *Defenders of Wildlife v. Browner*, (1999) 191 F.3d 1159, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit held that Congress has expressly required industrial storm water dischargers to comply with the requirements of 33 U.S.C. Section 1311 and, therefore, such dischargers shall achieve any more stringent effluent limitation, including those necessary to meet water quality standards established pursuant to any state law or regulation. ***“In other words, industrial discharges must comply strictly with state water quality standards.”***

The US EPA has adopted the California Toxics Rule (“CTR”) and the National Toxics Rule (“NTR”) that contain numeric water quality criteria for toxic pollutants in California. In addition, Water Quality Standards are contained within Basin Plans and the Ocean Plan developed by the Regional and State Boards and approved by the US EPA.

Industrial storm water discharges must comply strictly with these WQSs and the Permit issued by the Board must include requirements to achieve compliance with these standards. Not only must industrial discharges comply strictly with WQSs, the Board as the State's NPDES permitting authority is required to issue a permit with requirements that ensure industrial discharges comply strictly with WQSs. In other words, the Board may not simply tell a discharger *not to* violate WQSs, but tell such discharges *what to do* to comply with WQSs by providing permitting requirements that (if followed) will ensure industrial discharges comply strictly with WQSs. As the Court held in *Defenders*, ***NPDES permits for industrial facilities are mandated to include requirements that receiving waters meet water quality based standards*** (emphasis added).

## **B. Impairment of the State's Waters By Industrial Pollutants**

Congress has required industrial storm water discharges and industrial storm water discharge permits to achieve strict compliance with WQSs given the potential for industrial pollutants to impair the Nation's waters. On February 4, 2003, the Board approved California's 2002 CWA section 303(d) list of water quality limited segments. The 303(d) list identifies 687 surface waters within California that do not meet applicable WQSs even after all known point sources have been permitted and subjected to technology based controls.

Many if not most of the states 687 impaired waters are impaired by pollutants associated with industrial activities. For example, the basin regulated by the Los Angeles Regional Water Quality Control Board (Region 4) has the greatest number of impaired waters (182) and the greatest number of waters impaired by industrial pollutants. Notably, Region 4 is the most heavily industrialized region in California. Pollutants associated with industrial activity which have been identified as impairing waters within Region 4, include: Metals, Mercury, Selenium, Cadmium, Copper, Lead, pH, Sediment Toxicity, Silver, Zinc, PAHs, Ammonia, Chromium, Nickel, Sulfates, Boron, Chloride, Aluminum, Oil, Dichloroethylene/1,1-DCE, Tetrachloroethylene/PCE and Trichloroethylene/TCE. These industrial pollutants have also been identified as impairing waters in other industrialized regions of the state.

Many industrial pollutants are toxic, or "priority", pollutants for which numeric water quality criteria have been established by US EPA, and which are included in the CTR and NTR. In addition, industrial facilities have the potential to discharge other non-priority pollutants, such as oil and grease, pesticides from irrigation and other pollutants that may violate WQSs contained in applicable Basin Plans. The discharge of an impairing pollutant above WQSs by an industrial facility to waters already impaired by that pollutant by definition causes or contributes to impairment of water quality, and constitutes a WQS

violation. Further, the discharge of any bioaccumulative or persistent pollutants by an industrial facility to a water body impaired by that pollutant causes or contributes to impairment, and constitutes a WQS violation. Under the CWA, the Permit ultimately issued by the Board must contain requirements adequate to ensure that this contribution to impairment is eliminated.

**C. Technology/BMP Based Effluent Limitations Have Failed to Achieve Compliance with Water Quality Standards**

Industrial dischargers have been operating under the statewide Permit since 1992. The Permit has relied and continues to rely on narrative technology based effluent limitations (BMPs to achieve BCT/BAT) in order to reduce or prevent the discharge of pollutants in storm water discharges from thousands of industrial facilities, and under the proposed reissuance of the Permit, to achieve WQSs. The technology based effluent limitations contained in the statewide Permit, and now again in the draft Permit, have not and cannot ensure that all permitted industrial discharges comply strictly with WQSs as required by the CWA. In fact, the Permit's BMP/technology based effluent limitations have resulted in widespread failure of industrial discharges to comply with WQSs, strictly or otherwise.

Dischargers have submitted over ten years of sampling data under the current General Permit. While the State Board staff apparently failed to consider any of this data in preparing the draft General Permit, between 1993 and 1995 the San Francisco Regional Board entered General Permit sampling data into a database, between 2001 and 2002 the Los Angeles and created a similar database, while between 1996 and 2001, the Orange County Board created its database. Waterkeepers has analyzed the available electronic data, and has drawn the following conclusions:

- 1) For all industrial dischargers sampling for Cu, Pb, and Zn, concentrations of pollutants discharged have **increased** rather than decreased between 1993 and 2002.
- 2) For dischargers in the Los Angeles Region sampling for Cu, Pb and Zn (chosen because all major receiving waters in the Los Angeles Region are impaired for those pollutants), **99.5% exceed WQS for Cu, 99.9% exceed WQS for Pb, and 92.4% exceed WQS for Zn.**

Thus based even on this limited review of stormwater sampling data collected and submitted by General Permittees, the BMP based approach continued in the draft General Permit fails to achieve compliance with the applicable WQS.

Board staff itself concedes that not all industrial discharges covered under the Permit will achieve strict compliance with WQSs by utilizing BMPs. The Board states in

the Fact Sheet to the draft Permit: "Implementation of best management practices ("BMPs") that comply with BAT and BCT will usually result in compliance with water quality standards". The Board provides no support for this conclusion, and as demonstrated above, flies in the face of the available data. Further, Board staff conveniently ignore the fact that the CWA prohibits issuance of a permit that does not ensure that **all** industrial discharges covered by it comply strictly with WQSs. Contrary to the Board's conclusion that BMPs "usually" result in compliance with WQSs, such technology based effluent limitations have in fact usually result in non-compliance with WQSs by industrial dischargers.

Because the draft Permit will permit industrial discharges in violation of WQSs, despite compliance with the technical terms of the permit, the Permit is unlawful, and the State has failed to meet its legal obligations as required under the CWA.

### **III. NUMERIC EFFLUENT LIMITATIONS ARE REQUIRED TO ENSURE COMPLIANCE WITH WATER QUALITY STANDARDS**

As the gulf between beneficial uses listed and beneficial uses actually achieved in California's waters continues to grow, the State Board can no longer ignore the fact that the narrative effluent limitations contained in the draft General Permit have not and cannot ensure that industrial discharges do not impair our waters. In fact, the Board's reliance on narrative technology based effluent limitations in the statewide Permit has resulted in the continued discharge of industrial and other pollutants to the state's waters causing and contributing to further water quality impairment. The situation at hand (687 impaired waters and industrial discharges continuing to violate WQSs) hardly conforms to Congress' original intent in enacting the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. . ." 33 U.S.C. section 1251(a) or "the national goal that the discharge of pollutants to navigable waters be eliminated by 1985". 33 U.S.C. section 1251(a)(1).

Given (1) the widespread impairment of the state's waters by various industrial and other pollutants; (2) the failure of the Permit's narrative BMP/technology based effluent limitations to prevent WQS violations, and; (3) the potential for thousands of industries and pollutants covered by the Permit to cause or contribute to water quality impairment, the Board must adopt more stringent effluent limitations to ensure that all industrial discharges comply strictly with WQSs. Numeric effluent limitations in stormwater permits are not infeasible, and are the only way California can ensure that all permitted industrial storm water discharges within the State meet WQSs.



### **A Stormwater Permits With Numeric Effluent Limitations Ensure Compliance with Water Quality Standards**

The Waterkeepers have collected and compared sampling data for dischargers operating under the General Permit (BMP/technology based effluent limitations) and dischargers operating under individual stormwater permits (numeric effluent limitations). The comparison is striking.

For all industries reporting metals concentrations, only 43% of the dischargers operating under the General Permit comply with the Cu Multi-Sector Permit Benchmark, while 71% comply with Pb benchmark levels. For the Los Angeles Region, well over 90% of dischargers are causing or contributing to excursions of WQS. In contrast, the Ecology Auto Wrecking Rialto facility, and the Adams Steel Santa Ana facility, both with individual stormwater permits, consistently meet both Benchmarks and the WQBELs set out in their permits.<sup>1</sup>

### **B Establishing Numeric Effluent Limitations is Not Infeasible**

In an order dated July 7, 2000 in *San Francisco Baykeeper et al. v. California State Water Resources Control Board*, Judge Connelly, ruled that consistent with the CWA, BMPs may be used in lieu of numeric effluent limitations in the Construction Stormwater Permit (an industrial stormwater permit) where numeric effluent limitations are infeasible. *Baykeeper v. State Board*, pp.5-6. Judge Connelly upheld the State Board's use of BMPs in lieu of numeric effluent limitations in the Construction Stormwater Permit, holding that the lack of data on Construction Stormwater discharges made the development of numeric effluent limitations infeasible. *Id.* at 6; *See also Tesoro Refining v. Communities for a Better Environment*, Case No. A100327 (First Appellate Division, 5/30/03) at 18 (numeric WQBELs not required where not feasible).

Establishing numeric effluent limitations for the draft General Permit is clearly not infeasible. In contrast with the Construction Permit, where until required by the Court's Order in *Baykeeper v. State Board*, no sampling data was collected, sampling has been required under the General Permit since its adoption in 1992. Thus over ten years of stormwater sampling data is available for analysis by the State Board for the development of numeric WQBELs.<sup>2</sup> Waterkeepers incorporates by reference the stormwater sampling

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<sup>1</sup> Adams Steel Santa Ana is having some difficulty meeting its Zinc limits, but these violations will presumably be corrected soon through enforcement.

<sup>2</sup> Waterkeepers have attached hereto as Exhibit B a Letter from Celeste Cantu to Ms. Eliza Smith Re Public Records Act Request wherein Ms. Cantu describes the wealth

data submitted to each of the Regional Boards by General Permit dischargers since 1992 into this comment letter. While it appears that none of this data has been considered by State Board staff in developing the draft General Permit, it is clear that more than adequate data is available to the State Board to develop numeric WQBELs.

Further, numeric effluent limitations have been developed by the Regional Boards and included in storm water permits, including industrial storm water permits in Los Angeles and Orange Counties. *See Exhibit D.* As noted in section II B above, these numeric WQBELs have resulted in significantly higher levels of compliance. It is unclear to Waterkeeper why Regional Boards have been able to include numeric effluent limits in industrial stormwater permits, while State Board staff has determined that the exercise is "infeasible."

**C      A Reasonable Potential Analysis Must Be Conducted, and WQBELs Established for Every Category of Industrial Discharge Covered by the Statewide General Industrial Permit**

USEPA has provided a regulatory scheme that NPDES permitting authorities must follow to ensure that WQBELs are developed and included in NPDES permits for discharges containing pollutants at levels that will cause, or have the reasonable potential to cause, or contribute to an excursion above WQSSs.

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . .  
40 C.F.R. section 122.44(d)(1)(I).

EPA has developed guidance documents to assist permit writers in undertaking the RPA analysis. The EPA Permit Writer's Handbook (1996) sets out the threshold requirement for RPAs:

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of discharge data in possession of the Board and the Regional Boards related to industrial storm water discharges.

### **Reasonable Potential and Numeric Criteria**

When conducting an effluent characterization to determine if WQBELs are needed based on chemical-specific numeric in the water quality standards, the permit writer projects the receiving waters concentration of pollutants contained in the effluent once that effluent enters the receiving water. If the projected concentration exceeds the applicable numeric water quality criteria for a specific pollutant, there is reasonable potential that the discharge may cause or contribute to an excursion above the applicable water quality standards and the permit writer must develop a WQBEL. Permit Writer's Handbook, p. 100.

The Handbook goes on to explain the data to be evaluated:

### **Determining Reasonable Potential With Effluent Monitoring Data**

When characterizing an effluent for the need for a WQBEL, the permit writer should use **any available effluent monitoring data** as well as other information relating to the discharge...as the basis for a decision...EPA recommends monitoring data be generated prior to permit limit development for the following reasons: (1) the presence or absence of a pollutant can be more clearly established or refuted; and (2) effluent variability can be more clearly defined. Permit Writer's Handbook, p. 101 (emphasis added).

The Board possesses a wealth of information and evidence relating to discharges from industrial stormwater dischargers, including most relevantly the sampling data collected by the dischargers themselves since 1992.<sup>3</sup> As demonstrated by Waterkeepers' limited RPA analysis of monitoring data in the Los Angeles area, extensive evidence (and monitoring data) shows that concentrations of pollutants discharged pursuant to the General Permit cause or contribute to excursions above the chemical specific numeric criteria in applicable water quality standards. For the heavy metal Copper, **99.5%** of all discharges from Auto and Scrap recycling facilities in the Los Angeles area are exceeding WQS; for lead **99.9%**, and for zinc **92.4%**. Thus a RPA analysis of the over ten years of

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<sup>3</sup> Waterkeepers began requesting all sampling data collected under the General Permit in 2001. The State Board responded that providing the data requested represented a "significant burden" upon Regional Board staff resources, indicating that the State Board had not undertaken the effort itself in developing the draft General Permit. At a meeting between Waterkeepers and State Board staff in 2002, Waterkeepers' attorney asked if State Board staff had considered the data in conducting an RPA, and staff responded that the sampling data was for Regional Boards, not the State Board, to consider. No RPA or other analysis of the sampling data is discussed in the Permit material. Therefore Waterkeeper concludes that none of the data has been reviewed by State Board staff.

available monitoring data to determine which parameters have the potential to exceed WQS is required by law.

Once the RPA is complete, the Permit must include limitations that **control** all pollutants or pollutant parameters which the Board determines “are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i).

For waters that are Section 303(d) listed as impaired, the RPA for discharges of impairing pollutants is simple: discharges above WQSs have the reasonable potential to cause, or contribute, to excursions above State WQSs. Similarly, developing the WQBEL to be included in the General Permit is simple: the WQBEL is the CTR, NTR, Ocean Plan, or Basin plan WQS for that pollutant. Thus for the copper, lead and zinc excursions identified by Waterkeepers, the WQBEL for the Auto Recycling and Scrap industries is CTR for those pollutants, applied at the point of discharge. For waters not impaired, and thus with some assimilative capacity, the RPA and the development of the WQBEL is more complicated. Nonetheless, State Board staff is required to undertake this analysis in developing all NPDES permits, including the General Permit.

The Board has provided no justification for its failure to conduct similar RPAs as conducted by Mr. Rollins, the Regional Boards and other water quality experts. The Board may not ignore the CWA’s regulatory scheme for conducting RPAs and making determinations regarding the reasonable potential of industrial discharges to cause or contribute to excursions above WQSs.

**D Water Quality Based Effluent Limitations Must Be Included In the Permit Where Permitted Discharges are Determined to Cause, or Have the Reasonable Potential to Cause Excursions Above Water Quality Standards**

The Board must not only conduct RPAs, but is also required to include WQBELs in the Permit for discharges of pollutants that the Board determines causes, or has the reasonable potential to cause, or contribute to excursions above WQSs. 40 C.F.R. § 122.44(d)(1). If the State has not established a water quality criterion for a specific pollutant which causes, or has a reasonable potential to cause, or contribute to an excursion above narrative WQSs, the State must establish effluent limitations using either (1) calculated numeric water quality criteria which will attain and maintain applicable narrative water quality criteria and will fully protect the designated use; (2) establish effluent limitations on a case by case basis using EPA water quality criteria and other relevant information, or; (3) establish effluent limitations for an indicator parameter provided the Permit identifies which pollutants are intended to be controlled. 40 C.F.R. §

122.44(d)(1)(vi)(A)-C). While the Board is not legally required per se to adopt numeric WQBELs, numeric WQBELs are in fact *feasible and necessary* to develop and apply in order *to achieve strict compliance with WQSs by industrial dischargers* in California as required by the CWA.

In addition to developing numeric WQBELs for inclusion in the Permit the Board must include WQBELs already developed by USEPA and other sources. CTR and NTR water quality criteria adopted by USEPA must be included in the Permit as WQBELs for end of pipe industrial discharges of priority pollutants to waters impaired by such priority pollutants. Industrial discharges of all other pollutants to waters which are impaired by the same pollutants must be required by the Permit to meet end of pipe narrative and numeric water quality standards contained in applicable Basin Plans. Ultimately, the Board must adopt and include within the Permit, or permits, numeric effluent limitations for all pollutants in industrial discharges which cause, or have the reasonable potential to cause, or contribute to WQS violations given the failure of narrative BMP/technology based effluent limitations to achieve strict compliance with WQSs and the difficulties associated with applying narrative WQBELs to achieve strict compliance with WQSs. Numeric effluent limitations are the most reliable vehicle by which to achieve strict compliance with WQSs in California and are necessary given the variety and extent of industrial discharges in the State and the variety and extent of impairing pollutants present in the State's waters.

### **III. THE INDUSTRIAL PERMIT'S MONITORING PROGRAM IS INADEQUATE TO DEMONSTRATE THAT DISCHARGERS ARE IN COMPLIANCE WITH PERMIT LIMITATIONS**

As noted by the draft General Permit, the purpose of the monitoring program is to "indicate whether storm water discharges and authorized non-storm water discharges satisfy the Discharges Prohibitions, Effluent Limitations, and Receiving Water Limitations of this General Permit." The monitoring program proposed in the draft General Permit fails to provide an adequate mechanism for determining compliance with either the Water Quality Based Effluent Limitations or the Technology Based Effluent Limitations set out in the Permit, however. The Permit as drafted provides no mechanism for comparing the sampling results obtained to WQS to evaluate compliance, or even to determine what WQS applies to an individual site; no meaningful criteria for evaluating compliance with the BAT/BCT standard for the BMPs applied; and inadequate sampling parameters for industrial categories likely to discharge impairing pollutants.

**1. The Monitoring Program Fails to Demonstrate Compliance (or Non-Compliance) with Water Quality Standards**

The primary purpose of the monitoring program is to evaluate whether the BMPs and other pollution control measures at a facility are working effectively to keep industrial stormwater discharges in strict compliance with the WQSs. While the draft General Permit for the first time articulates the WQS applicable to permittees (although Waterkeepers notes that the draft General Permit lists the Statewide Water Quality Control Plan, which Waterkeepers is unfamiliar with, the CTR, and the Basin Plans—improperly excluding NTR and the Ocean Plan), the Monitoring Program nowhere explains how to evaluate which of these WQSs apply to a site, or how to compare sampling data collected to WQS to determine whether compliance has been achieved. Further, the Monitoring Program nowhere mentions the impact 303(d) listing of receiving waters would have on WQS compliance, or how to determine whether receiving waters are 303(d) listed. In essence, having failed to conduct an RPA, or to adopt numeric WQBELs, the draft General Permit effectively requires each individual discharger to conduct the RPA and develop its own WQBEL to determine whether its facility is causing or contributing to WQS excursions. Obviously expecting over 9,000 individual dischargers to undertake this analysis is absurd, and fails to comply with the CWA.

Waterkeepers and the Sacramento Superior Court have previously addressed precisely this problem in the Construction Stormwater Permit. After being ordered by the Court to include sampling sufficient to evaluate compliance with WQS, the State Board modified the Construction Permit to include upstream and downstream sampling for sediment, and discharge samples and “uncontaminated” comparison samples for other pollutants. As here, the State Board failed to provide any methodology for evaluating whether discharges are causing or contributing to violations of WQS. The Court rejected the Construction Permit modifications, finding:

Without greater specificity and guidance, the sampling and analysis requirements for visually nondetectable pollutants are ambiguous and subject to misinterpretation and misapplication by permittees that would render the sampling and analysis ineffective in monitoring whether discharged pollutants are causing or contributing to water quality exceedances. In particular, because the General Permit modifications lack any reference to existing water quality standards and fail to detail the role such standards play in the development of sampling procedures and in the analysis of the sampling results, permittees may...fail to recognize the need to identify and use applicable water quality standards. *BayKeeper v. State Board*, pp. 6-7.

As noted above, the State Board has abandoned its appeal of Judge Connolly's Orders, and has accepted them as controlling law. Despite the clear direction provided in the Court's Orders (and the CWA), the draft General Permit makes precisely the same error in failing to articulate how to determine compliance with WQS. Therefore the General Permit must at a minimum:

- 1) Provide a mechanism for identifying whether the receiving waters of an individual discharge is 303(d) listed as impaired, and the pollutants causing the impairment;
- 2) Provide a mechanism for identifying whether the industrial site is discharging impairing pollutants;
- 3) Provide a mechanism for identifying the applicable WQS;
- 4) Provide a mechanism for determining whether the discharge is causing or contributing to an excursion of WQS.

As noted above, this analysis is relatively simple for discharges of impairing pollutants to impaired water bodies. For all other discharges, however, Waterkeepers is unclear how the State Board can accomplish this requirement without adopting numeric effluent limitations.

## **2. The Monitoring Program Fails to Demonstrate Compliance (or Non-Compliance) with the BAT/BCP Standard**

The draft General Permit provides no mechanism for determining whether the BMPs applied at a specific site comply with the BAT/BCT requirement of the Permit. While Waterkeepers and the Federal District Courts for the Northern and Central Districts have used the Benchmark Levels set out in the Federal Multi-sector Permit as an objective standard for evaluating compliance with the BAT/BCT standard, the draft General Permit specifically rejects the Federal Benchmarks as criteria for evaluating monitoring results, finding that "exceedances of these benchmarks are not automatically considered permit violations." In rejecting this objective standard already applied in the controlling Federal Courts in the two most industrialized Districts in the State, the draft General Permit provides no other mechanism for evaluating compliance.

In *Ecological Rights Foundation v. Sierra Pacific Industries*, C-01-0520 MEJ (ND Cal 2002), the Court found that while Benchmark levels do not apply directly to industrial dischargers covered by the statewide Permit in California, a violation of such guidelines can provide the basis for a finding that a discharger has violated the BAT/BCT requirement of the Permit. And, in fact, that was the finding of the court; Sierra Pacific Industries ("SPI") was found to be in violation of the Permit's BAT/BCT requirement because of its discharges in exceedance of the federal benchmarks set out in the Multi-Sector Permit.

[T]he storm water sampling results, which show exceedances of benchmarks established by EPA, demonstrate that the management practices implemented at the Arcata Mill do not meet the BAT/BCT standard required by the General Permit. *Id.* at p. 44

The Court also ruled that SPI's monitoring results showed discharges in exceedance of WQSS included in the applicable Basin Plan and therefore such discharges violated the statewide, Permit and the CWA since both provide that discharges shall not cause or contribute to an exceedance of any applicable water quality standard. The Court further ruled that *any* discharge of petroleum hydrocarbons, PCP or TCP to waters in the of the region violates the Basin Plan. Since SPI's discharges contained some of these constituents, the discharges were found to be illegal and "... are conclusive evidence of Clean Water Act violations." *Id.*

Similarly, in *Santa Monica BayKeeper v. Sunlite Salvage*, CV 99-04578 WDK (CD Cal. 1999), the District Court ruled:

The benchmark levels set out in the EPA Multi-Sector Permit provide an objective standard to determine if BAT has been implemented; if storm water containing concentrations of toxic pollutants above benchmark levels is being discharged, further BMPs are required and this BAT is not being achieved. *Sunlite* at p.5.

In light of the Federal Courts' rulings in the *Ecological Rights* and *Sunlite Salvage*, the Permit must articulate benchmarks as the standard for determining compliance with the BAT/BCT standard, and/or provide an equally definitive standard for evaluating compliance. At a minimum, the State Board must eliminate the finding that Federal Benchmarks are inapplicable to the General permit, as this is clearly inconsistent with controlling Federal precedent.

### **3. The Monitoring Program Fails to Require Evaluation of All Parameters With the Potential to Violate WQS**

Per 33 U.S.C. section 1318, the Board must include reporting, sampling and monitoring requirements as necessary to develop effluent limitations and determine violations of effluent limitations. The monitoring program provided in the current draft Permit is inadequate for either purpose.

The draft Permit requires permittees to have storm water samples analyzed for several "indicator parameters", including pH, TSS, TOC or oil and gas, and specific



conductance. Additional parameters for specific industries taken directly from the Federal Multi-sector Permit are also included. Finally, permittees are also required to self identify, sample and test for other unspecified parameters (materials that may be exposed to and mobilized by storm water), toxic chemicals and other pollutants "that are likely to be present in storm water discharges in significant quantities." While this represents a significant improvement from the prior General Permit, it still fails to provide sufficient information to allow dischargers to sample for all parameters which may be causing or contributing to WQS excursions.

Waterkeepers limited analysis of the Auto and Scrap Recycling industries in Los Angeles indicates that those permittees consistently exceed WQS standards for Cu, Pb and Zn. Despite this, the draft General Permit fails to require sampling for Cu or Zn at wrecking yards, or for Cu at Scrap Recyclers. Waterkeepers is confident that an analysis of the over 10 years of available data for the other industrial categories covered by the Permit will demonstrate numerous other parameters causing or contributing to WQS violations that the draft General Permit currently fails to require sampling for. Therefore in order to ensure that WQS are strictly complied with under the General Permit, the State Board must conduct this analysis of the data, include sampling requirements for all parameters identified as potentially contributing to WQS exceedances.

**D. The Group Monitoring Program Fails to Provide Monitoring Adequate To Demonstrate Compliance with Water Quality Standards by Whole Groups of Industrial Dischargers**

Industries that participating in the group monitoring program provided by the Permit must conduct storm water sampling and analysis only twice during the life of the Permit. The infrequency of sampling and analysis under the Group Program guarantees that discharges in violation of WQSs will go undetected. This reduction in sampling requirements is provided as a "reward" for assumed improved compliance with the Permit achieved in group monitoring programs.

Unfortunately many if not most Group Monitoring Programs (GMP) have failed to improve compliance levels. GMPs have little or no enforcement authority under the Permit, and in fact have incentives not to impose effective BMPs on Group members, or to report non-compliance. The largest GMPs compete for customers, and therefore to keep GMPs fees as low as possible, provide little meaningful compliance advice. The example best known to Waterkeepers is Brash Industries, operating an Auto Recycling GMP. Brash GMP Group leader Marv Sachse has testified under oath on behalf of his client, Sunlite Salvage, that no WQS are applicable under the General permit. Mr. Sachse further testified that Sunlite was in full compliance with the General Permit, despite never having visited the site. Mr. Sachse has also provided a SWPPP for a 17 acre 500,000 cubic yard uncontained waste pile, stating that no BMPs were required for the pile

because no industrial storm water was discharged from it. Mr. Sachse's bizarre interpretations and advice relating to the General Permit have been paralleled by other group leaders.

Apparently in response to complaints about the GMP provisions of the General Permit by Regional Boards and citizen enforcement groups, the draft General Permit includes some standards for GMPs. Unfortunately, the loopholes in the proposed standards swallow the rules. For example, the draft General Permit sets minimum requirements to Group Leader qualifications, including Registered Engineers, a Bachelors Science Degrees with 3 years experience in Storm Water Management, or Registered Environmental Assessors with five years experience. Unfortunately, the criteria is undermined by the catch all term added at the end: Other individuals who have sufficient education and experience to prepare, or supervise the preparation of, GMP-related technical documents. Under this criteria anyone can qualify as a Group Leader. Further, the draft General Permit fails to provide any criteria or mechanism for de-certifying a GMP or a Group Leader. To Waterkeeper's knowledge, despite flagrant abuses, no GMP has been de-certified by State Board staff. Staff have expressed their concerns about litigation against the State Board if de-certification is undertaken. Failing to articulate the process in the General Permit virtually guarantees that no action will be taken against inadequate GMPs, and that GMP non-compliance will continue.

Therefore at a minimum, the General Permit must require the same sampling frequency from GMPs as individual permittees, and must articulate a clear enforceable criteria for minimum standards for GMPs, and the process for de-certifying non-compliant GMPs.

#### **IV. TO BE EFFECTIVE THE PERMIT MUST SPECIFICALLY COVER DISCHARGES TO WATERS OF THE STATE**

The current draft Permit states: "Discharges that do not enter waters of the United States are not required to be permitted." This is a significant change to the existing Permit, which regulated Waters of the State, including surface and ground waters.

Given the reductions of the boundaries of waters included in the definition of Waters of the United States proposed by the Bush administration, Waterkeepers believes protection of important receiving waters requires maintenance of General Permit coverage of all waters of the State. Eliminating regulation of industrial storm water discharges to isolated wetlands, lakes, ponds, or vernal pools will represent significant backsliding from the current Permit, and will expose those valuable resources to contamination and degradation. Further, a significant trend has emerged exploring infiltration as a method for achieving General Permit compliance. Changing the coverage of the General Permit to

exclude discharges to ground water will require the permittee to obtain a permit for waste discharge to land, raising a potential obstacle to this promising compliance method.

**V. THE PERMIT CANNOT EXCLUDE FORMER MINE SITES FROM SAMPLING REQUIREMENTS**

The draft General Permit proposes to exclude former mine sites from the sampling requirements imposed on other current and former industrial facilities where and engineer certifies every three years that a SWPPP has been implemented.

Inactive mines have been acknowledged as a major source of toxic pollutants to California's Waters. For example, former mines are the primary source of highly toxic mercury to South San Francisco Bay (the New Almaden Mines) and the Sacramento Delta, a major source of drinking water. In the case of the New Almaden Mines, storm water run-off carrying mercury has accumulated in fish tissue at hazardous waste levels in some receiving waters. It is unclear to Waterkeepers how exempting these serious sources of contaminants from sampling requirements will ensure that discharges from the inactive mine sites will not cause or contribute to WQS violations. Therefore at a minimum, inactive mine sites must sample at the same level as other industrial sites.

**VI. CONCLUSION**

Despite the clear conclusions to be drawn from the available sampling data, and the direction of the Sacramento Superior Court on virtually identical issues, State Board staff has elected to propose a draft General Permit unchanged in its fundamentals from the failed and illegal prior General Permit. Waterkeeper remains hopeful that the State Board will provide direction to staff to correct the glaring inadequacies without further intervention from the Courts.

Respectfully submitted,

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